IN THE

Supreme Court Of The United States

AUG 10 1995
CLERK

October Term, 1995

MARTHA CARROLL; JAMES CARROLL; ROSETTA EDWINA ROGERS; JAMES CARROLL, JR.; KEITH S. GENTLE; BELINDA GADDIS, individually and as next friend and parent of Justin Gaddis and Derrick Gaddis, both minors; RANDY GADDIS, individually and as next friend and parent of Justin Gaddis and Derrick Gaddis, both minors; FRED ALLEN CHAMBERS, individually and as next friend and parent of Rusty Chambers, a minor; DEBBIE CHAMBERS, individually and as next friend and parent of Rusty Chambers a minor; BARBARA MESSER; ANCY SIMONDS, individually and as next friend and parent of Jennifer Simonds, a minor; JAMES GREEN; MARVIN GARRETT; KENNY GREEN; PEGGY GREEN; SANDRA HANCOCK, individually and as next friend and parent of Chuck Hancock, a minor; JAMES R. MESSER, individually and as next friend and parent of Jonathan Messer, a minor; MELANIE MESSER, individually and as next friend and parent of Jonathan Messer, a minor,

Cross-Petitioners,

v.

LITTON SYSTEMS, INC.,

Cross-Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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RULE 29.1 LIST

The parent company of Litton Systems, Inc. is Litton Industries, Inc. There are no subsidiaries of Litton Systems, Inc. required to be disclosed under Supreme Court Rule 29.1.

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RULE

Fed. R. Evid. 702 1

STATEMENT OF THE CASE

The petition in this case seeks review of a straightforward legal question:

> May a federal district court, consistent with this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), submit complex toxic tort claims to a jury in the absence of *any* admissible expert testimony on the questions of (a) exposure and (b) specific medical causation?

This is a question that can and should be answered by this Court as it is phrased.

By contrast, the conditional cross-petitioners seek this Court's review of a host of fact-laden evidentiary issues underlying the district court's exclusion of plaintiffs' expert testimony on exposure and specific medical causation and the Fourth Circuit's affirmance of that exclusion. This Court need not immerse itself in these issues in order to answer the question posed by the original petition, nor is there any independent reason why this Court should address such issues as they arise in this case.

In any event, the premise of the conditional cross-petition, *i.e.*, that the lower courts allegedly used the wrong standard in assessing the admissibility of plaintiffs' expert testimony, is incorrect as a matter of fact and law.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

By their conditional cross-petition, respondents ask this Court, if it accepts the petition for *certiorari*, to reexamine the underlying evidentiary rulings of the courts below that found plaintiffs' experts' opinions scientifically unreliable and inadmissible under Fed. R. Evid. 702. The Court should deny the conditional cross-petition. First, the petition itself can be answered properly without reconsideration of the lower courts'

comprehensive evidentiary rulings. Second, cross-petitioners have not shown that the lower courts applied the wrong standard in excluding the critical testimony of their expert witnesses on exposure and specific medical causation.

I. The Original Petition May Be Granted And Fairly Ruled Upon Without Supreme Court Review Of The Underlying Evidentiary Questions.

The principal question presented by the original petition is:

> May a federal district court, consistent with this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), submit complex toxic tort claims to a jury in the absence of *any* admissible expert testimony on the questions of (a) exposure and (b) specific medical causation?

Pet. at i. This question does not require any reanalysis by this Court of the lower courts' evidentiary determinations.

In a comprehensive opinion, the district court explained its reasons for excluding cross-petitioners' critical expert testimony, and the Fourth Circuit's opinion affirmed those rulings under *Daubert*. No reason exists or has been suggested by cross-petitioners for this Court to undertake another review of those rulings as a predicate for answering the question posed by the original petition. *That* question can be answered cleanly and fairly as phrased, because it is undisputed — on the present record — that plaintiffs have no expert testimony to show when they were allegedly exposed to toxic chemicals and no expert testimony that any of their physical complaints were more probably than not caused in fact by their claimed exposures to those chemicals.[1]

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[1] *See* Respondents' Brief in Opposition at 11 ("[t]he Fourth Circuit ruled Mr. Moore's testimony inadmissible as unreliable"); *id.* at 12 ("[t]he Fourth Circuit further ruled that Plaintiffs could not rely on the opinions of their three medical experts that the Plaintiffs' medical problems were caused by Litton's TCE").

II. The Lower Courts Correctly Fulfilled Their Responsibilities To Review Proposed Expert Testimony And Determine Admissibility Under Federal Rule of Evidence 702 And Other Authorities.

The conditional cross-petition is founded on an incorrect portrayal of the lower courts' rulings. Cross-petitioners assert that the district court erroneously applied *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which was rejected in *Daubert* as the sole criterion under which admissibility of expert testimony should be judged in the federal courts. Cross-Petition at 4. Although the district court did cite *Frye*'s general acceptance standard, *see* Conclusions of Law, ¶¶ B.15 to B.16, App. at 127a-29a, it noted that its "conclusions of law would be the same even if the *Frye* standard were ignored and plaintiffs' more liberal standard accepted," Conclusions of Law, ¶ B.17, App. at 129a. The district court thus cited and relied upon many cases that turned specifically on Rule 702's requirement that expert opinions be reliable and nonspeculative. *See* Conclusions of Law, ¶¶ B.5 to B.14, App. at 122a-27a.[2] The Fourth Circuit affirmed the district court's exclusion of expert witnesses without finding it necessary to rely upon the *Frye* standard and expressly applied *Daubert*. Accordingly, the district court's reference to *Frye* does not indicate that its ruling — much less the Fourth Circuit's — conflicts with *Daubert*.

Moreover, this Court in *Daubert* held that one of the factors that should be considered by a district court under Rule 702 was whether a particular methodology has gained general acceptance in the relevant scientific community, *i.e.*, the *Frye* stand-

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[2] Thus, for example, the district court repeatedly relied upon *United States v. Baller*, 519 F.2d 463 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975). *See* Conclusions of Law, ¶¶ B.6, B.12, B.16, D.26, Memorandum and Recommendation, Part IV; App. at 123a, 126a, 128a-29a, 142a, 196a. Cross-petitioners approvingly cited *Baller*, Cross-Petition at 5, as consistent with *Daubert* and reflecting a more liberal standard of admissibility than *Frye*.

ard. 113 S. Ct. at 2797. To the extent that the district court addressed the lack of general acceptance of the opinions of cross-petitioners' experts, it thus did what this Court said in *Daubert* was appropriate. Accordingly, cross-petitioners have failed to show that the district court's citation of *Frye* constitutes grounds for reversal of its exclusion of the expert testimony of Mr. Moore and Dr. Spencer.

Cross-petitioners also complain that the lower courts ignored or failed to understand the arguments they offered in support of their experts' opinions. In *Daubert*, this Court expressed its confidence that the lower federal courts were fully capable of making determinations concerning the reliability of scientific methodology and ascertaining whether proffered opinions were based upon scientific knowledge or mere speculation. 113 S. Ct. at 2796.[3] The district court's comprehensive opinion here shows that this confidence was well-founded.

The district court's opinion includes 164 carefully-annotated Findings of Fact on *Daubert*-related issues. *See* App. at pp. 68a-108a. Its Conclusions of Law on the same issues are equally well-detailed and well-supported. *See id.* at pp. 122a-43a, 192a-219a. Through the hundreds of paragraphs of its opinion, the district court competently digested the scientific issues presented by this case and, with more than a modicum of understanding, cited, *inter alia*, the affidavits and reports of cross-petitioners' experts, the admissions of cross-petitioners' experts in their depositions, and other detailed, scientific information. Although the district court opinion was issued nearly

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[3] What clearly emerges from the cross-petition is not a showing that the lower courts erred in their admissibility rulings, but cross-petitioners' unhappiness with *Daubert* itself. Cross-petitioners contend that the district court's rulings on reliability "illustrate . . . *the danger of non-scientist judges making improper judgments* of the reliability of scientific testimony . . .," Cross-Petition at 13 (emphasis added). To alleviate this "danger," cross-petitioners contend that the parties must be allowed to "convince a jury" on the issue of reliability. *Id.* at 13. This is exactly the position that *Daubert* rejected.

two years before *Daubert* was decided, the court's diligence in assessing the proffered expert testimony reflects precisely the thoughtful control of such testimony required by the Federal Rules of Evidence and articulated by the Court in *Daubert*.

The evidentiary rulings have now been accepted at three levels of judicial scrutiny: the United States Magistrate Judge, the United States District Court, and the Fourth Circuit. All concluded that plaintiffs' experts' opinions failed the test of scientific reliability under Fed. R. Evid. 702. Cross-petitioners have suggested no reason for this Court to second-guess these determinations.

CONCLUSION

For these reasons, the conditional cross-petition should be denied.

Respectfully submitted,

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